No. 3207

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS AND VERNITA WATTS,

Appellants,

Vs.

JERUSHA CRAB AND JOHN CRAB,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

WILL M. PETERSON
JAMES H. RALEY,
Attorneys for Appellants.

ALFRED S. BENNETT,
JAMES A. FEE,
Attorneys for Appellees.

East Oregonian, Pendleton

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS AND VERNITA WATTS,

Appellants,

Vs.

JERUSHA CRAB AND JOHN CRAB,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE

Thomas J. Watts, the grantor in the deeds hereinafter referred to, died on the 20th day of April, 1914, and at the time of his death was approximately eighty-two years old. He was first married in Albany, in the State of Oregon, and his first wife died in 1865, in the State of Idaho, leaving as the issue of such marriage two children, Jerusha Crab, one of the plaintiffs in this case, who was two years old at the time of the death of her mother, and another sister who subsequently died without heirs, and who is not in any manner interested in this proceeding.

The minor child Jerusha Crab, after the death of her mother, was first taken to live with an uncle, and remained there a year or such a matter, and returned and lived with her father, Thomas J. Watts, and her grand father for about three years, and at the age of six years was again taken to her uncle, Marvel Watts (not the defendant), who promised to make her one of his heirs, and with whom she ever afterward made her home until she married the other plaintiff herein, John Crab, and established a home for herself, never having since the age of six years lived with her father or his family, and having visited her father only a very few times and that in recent years.

After the death of his first wife, the mother of Jerusha Crab, Thomas J. Watts moved to Umatilla County, about the year 1870, and was again married in March, 1871, and since that date up to the time of his death lived continuously in Umatilla County, and either in or near the Town of Athena, Oregon.

There was born to Thomas J. Watts and his second wife while they lived in Umatilla County, two of the defendants in this case, Homer I. Watts and Marvel Watts, who were raised upon the farm and at the home of their father and mother, and during their boyhood days and for some time after their majority remained in and about the farm and assisted in the upbuilding, procuring and establishment of the home and the lands hereinafter referred to.

Marvel Watts, the older of the two boys by the

second wife, is now about forty-three years of age, and Homer Watts, the second of the two boys, is about forty-one years of age. Jerusha Crab, the plaintiff, is a half sister to these two boys, the defendants in the case. Marvel Watts, the older of the two boys, has been married for about eighteen years, and Jennie Anderson Watts, one of the defendants, is the wife of Marvel Watts and the daughter-in-law of Thomas J. Watts. To Marvel Watts and Jennie Anderson Watts there has been born one child, Vernita Watts, a crippled girl, who is now about sixteen years of age and is the granddaughter of the deceased, Thomas J. Watts. Homer I. Watts is married, has no children and his wife is not made a party defendant in this cause, Vernita Watts being the only grand child of the deceased, excepting the children of Jerusha Crab.

Thomas J. Watts and his second wife, Lizzie, the mother of the two boys, Homer I. and Marvel, lived together from 1871 until 1908, when Lizzie Watts secured a divorce from Thomas J. Watts, and though divorced, they continued to be on very friendly relations, the divorced husband frequently visiting Lizzie's home. Lizzie Watts survived her divorced husband and died at Athena, in Umatilla County, Oregon, on March 4, 1915.

For many years there seemed to have been but little or no communication between Thomas J. Watts and the daughter by the first wife, Jerusha Crab. It

was apparently an understanding, and which was later fulfilled, that Jerusha Crab should be one of the heirs of her uncle, Marvel Watts, with whom she made her home, and it appears in evidence that in pursuance of this understanding and agreement, she did inherit approximately $10,000.00 from said uncle, and in the mean time and after her marriage to John Crab, they had accumulated of their own a large amount of other property, approximately fifty or sixty thousand dollars worth, were comfortably fixed and well-to-do, all of which was known by Thomas J. Watts during his life time.

During the latter years of his life Thomas J. Watts occasionally visited with his daughter, Jerusha Crab, at her home in St. Johns, Wash., a distance of some 130 miles from Athena, and frequently traveled around at other places, making different trips to California, but during all of the time subsequent to the divorce from his second wife having and claiming the home of Marvel Watts, his son, at Athena, Oregon, as his home, and returning there always, retaining a room and bed at that place and treating it generally as his home.

During the time that the deceased lived in Umatilla County, he, together with his two boys, defendants in this case, and his second wife, Lizzie, accumulated quite a bit of property consisting of lands and town property. At the time of the divorce between Thomas J. Watts and Lizzie Watts he conveyed to his wife as a settlement of their property

rights certain property in Athena, and a valuable farm of 160 acres, thus settling their property rights and leaving the old gentleman at that time possessed of certain lands which will be described as three separate tracts:

First: The West Half of the Southeast Quarter, and the Southeast Quarter of the Southwest Quarter of Section 32, Township 5 North, Range 35 East, W. M. (Subsequently deeded to Marvel's wife.)

Second: The South Half of Section 30, Township 5 North, Range 35 East, W. M. (Subsequently deeded to the granddaughter, Vernita Watts).

Third: The Southeast Quarter of the Southeast Quarter of Section 31, and the Southwest Quarter of the Southwest Quarter of Section 32, Township 5 North, Range 35 East, W. M. (Remaining in the estate at the death of Thomas J. Watts).

For several years prior to the old gentleman's death the two boys, Homer and Marvel, had been farming the lands described, under a lease, giving to the lessor as rental therefor one-third of the crops raised.

Shortly before his death, and on the 14th day of April, 1914, the deceased deeded to Jennie Anderson Watts, the wife of his son, Marvel Watts, the West Half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section 32, Township 5 North, Range 35 East, **reserving, how-**

ever, to himself and for his own use during his life time, the rents, income and proceeds from said tract of land; and on the same date he deeded to his granddaughter, the daughter of Marvel Watts and Jennie Anderson Watts, the South Half of Section 30, Township 5 North, Range 35 East, absolute, retaining still in his own possession and his ownership the Southeast Quarter of the Southeast Quarter of Section 31, and the Southwest Quarter of the Southwest Quarter of Section 32, in Township 5 North, Range 35 East, W. M., which was owned by him at the time of his death and was subsequently administered upon as part of his estate.

This suit is brought by the plaintiffs against the defendants seeking to set aside the deeds given to Jennie Anderson Watts and Vernita Watts, on the grounds: **First,** that the grantor was at the time of executing the deeds incapacitated to make the deeds. **Second,** that he was induced to make them through undue influence exerted by the defendants. Plaintiffs also seek an accounting for crops raised on the lands since the death of Thomas J. Watts.

The plaintiffs also alleged that the defendants, Homer I. Watts and Marvel Watts, are the true beneficiaries under the deeds, and **demand** answers under oath from the defendants respecting all the material allegations of the bill of complaint.

The issues primarily involved are: **First,** was Thomas J. Watts at the time of the execution of the

deed of sufficient mental capacity to make an intelligent and knowing disposition of his property by deed; **Second,** was the making of the deeds the free and voluntary act of Thomas J. Watts, uninfluenced by any fraud, menace, persuasion or undue influence by the defendants.

Upon appeal a further issue arises upon the ruling of the District Court in denying defendants' motion to dismiss plaintiffs' bill for want of sufficient proof to sustain the allegations of the bill.

The District Court by findings and decree finds that the deeds were executed by Thomas J. Watts and that the deceased was probably possessed of a disposing mind, though in a weakened physical and mental condition. But further finds that the defendants by imposition and undue influence caused the deeds to be executed by him.

ASSIGNMENTS OF ERROR

I.

The Court erred in refusing to grant the motion of the defendants "For anorder to dismiss the bill of the plaintiffs upon the grounds that they have not offered any evidence sufficient to overcome or even to balance the answers which they have called for in this case under oath, and which have been sworn to, and are responsive in every manner to the allegations of the complaint"; which said motion was interposed by the defendants at the conclusion of the testimony

introduced by the plaintiffs in chief. The record discloses that the defendants were **required** to answer under oath, which they did. Defendants contend that since the plaintiffs sought a discovery, requiring the defendants to answer under oath, they are bound by the old rule that the sworn statements by the defendants in direct response to an allegation in the bill is deemed to be true, unless contradicted by two witnesses, or a single witness and corroborating circumstances. Defendants insist that at the time their motion was interposed there was no evidence whatever in support of the material allegation of the bill and that regardless of the motion, plaintiffs' complaint should have been dismissed for lack of proof.

II.

The Court was in error in finding and decreeing in the decree that Thomas J. Watts was the owner at the time of his death of the following described lands in Umatilla County, State of Oregon: The West Half of the Southeast Quarter, and the Southeast Quarter of the Southwest Quarter, of Section 32, and the South Half of Section 30, in Township 5 North, Range 35 E., W. M.

III.

The Court was in error in finding and decreeing that for a considerable time prior to his death the said Thomas J. Watts was "feeble in mind and mentally weak and easily influenced," and "That Homer

I. Watts and Marvel Watts procured from said said Thomas J. Watts a deed," for the said property.

IV.

The Court was in error in finding and decreeing in the decree that the deeds were without valuable consideration and were secured by fraud and deception and undue influence, and that they were not the voluntary and intelligent act of Thomas J. Watts, and that they are fraudulent and void and of no effect.

V.

The Court was in error in finding and decreeing in said decree that Jerusha Crab is the owner in equity by virtue of inheritance of an undivided one-third interest in said real property.

VI.

The Court was in error in finding and decreeing in said decree that Jennie Anderson Watts and Venita Watts are seeking to take advantage of any action of Marvel Watts and Homer Watts.

VII.

The Court was in error in the decree in decreeing that the deed be set aside and cancelled.

VIII.

And the Court was in error in finding and decreeing that Jerusha Crab is entitled to recover a one-third interest of the amount received from the crops of the said lands for the year 1917.

While the assignments of error embody several grounds of complaint urged by defendants against the decree of the District Court, they are all dependent and rest upon the First and Fourth Assignments, and for the purposes of this brief may be summed up in two general propositions:

First: The refusal of the Court to grant defendants' motion and dismiss plaintiffs' bill for a failure of proof.

Second: Were the deeds secured by fraud, undue influence or deception, and not made as the intelligent and voluntary act of the grantor.

ARGUMENT AND AUTHORITIES ON MOTION TO DISMISS BILL.

Considering now the first of the foregoing propositions, we call attention to Paragraphs 5, 6, 8 and 11 of the plaintiffs' complaint, the material part of which reads as follows:

V.

That for a considerable time prior to the death of said Thomas Watts he was very old and feeble in mind and body, and was sick and mentally weak and easily influenced and incapable of doing business or of an intelligent comprehension of his affairs or of making a conscious or intelligent disposition of his property among those entitled to his bounty.

That shortly before the death of said Thomas

Watts and while he was on his death bed and suffering from his last sickness, and so incapacitated as hereinbefore stated, the said defendants Homer I. Watts and Marvel Watts, Jennie Anderson Watts and Vernita Watts, and especially the defendants Homer I. Watts, Marvel Watts and Jennie Anderson Watts, conspired together to cheat and defraud the plaintiff, Jerusha Crab, out of her interest in her father's estate and to secure a deed purporting to be a deed from said Thomas Watts to the said Jennie Anderson Watts for the following described property, to-wit: * * * * * *

VI.

Plaintiffs further allege that said deeds and each of them were wholly without any valuable or other consideration and that the same, if executed by him at all, were secured from the said Thomas Watts when he was not fully conscious and was mentally incapacitated from making such a conveyance and by fraud and deception and undue influence, and by taking advantage of his enfeebled mental and physical condition, but that the said deeds were secured and obtained when the said Thomas Watts was sick in bed at the home of the defendant Homer I. Watts, and when the only other person present was a witness secured by said defendant, and that these plaintiffs have no knowledge nor means of knowledge as to the exact details as to how said deeds were obtained, or as to whether they were induced and secured by such undue influence and fraud, misrepre-

sentation and conduct as hereinbefore set forth and were actually signed by said Thomas Watts, or whether his name was forged thereto, but plaintiffs allege that said deeds were not the conscious and intelligent act of said Thomas Watts if signed by him at all, and that he had no intention or purpose of disposing of the said property or conveying it as set forth therein, and that in equity and good conscience said deeds are graudulent, void and of no effect.

VIII.

That plaintiffs believe and allege that the said Homer I. Watts and Marvel Watts and the other defendants have some arrangement between themselves by which they are to be the real owners and to receive the benefits from such land, and that the deeds were procured in the form they were solely for the purpose of enabling the said Homer I. Watts to take the acknowledgment of the same without calling in a third and disinterested party.

XI.

That plaintiffs have no speedy or adequate remedy at law. That said Vernita Watts is an infant under the age of eighteen years.

WHEREFORE, Plaintiffs pray this Court for a discovery and that the defendants be required and compelled to answer on oath * * *

First, as to whether said deeds were forgeries, or as to whether they were actually signed and executed

by the said Thomas Watts, and as to whether they claim, at the time they were so signed, that he was conscious and in the intelligent exercise of his faculties.

Second. As to what is the arrangement among themselves under which they are operating and possessing said property.

Third. As to what sums they or any of them have received as the rents and profits of said property.
* * * * * * * * *

And the plaintiffs pray to the Court that a writ of subpoena issue out of and under seal of this honorable Court to be directed to the said plaintiffs, commanding them and each of them, on a certain day and under a certain penalty in the said writ to be inserted, personally to be and appear before this Court and then and there full, true, and perfect answer **make under oath** to all and singular and premises hereinbefore set forth and further to stand to perform and abide such further orders, directions, and decree herein as to the Court shall deem meet and agreeable o equity and good conscience.

Answering plaintiffs' demand, separate answers were made **under oath** denying all the material allegations of the bill.

Prior to the promulgation of the equity rule of 1912, in the consideration of evidence the doctrine universally prevailed in the Federal Courts, that if a

defendant answered a bill under oath, directly and positively denying the allegations of the bill, such answer constituted evidence which required the testimony of two witnesses, or of a single witness with corroborating circumstances, to overcome the force and effect of such answer as evidence.

> Encyclopedie United States Supreme Court Reports, Vol. 5, page 886, and citations therein.

The reason of the rule was exemplified by Chief Justice Marshall as follows:

> "The general rule that either two witnesses or one witness with probable circumstances will be required to outweigh an answer asserting a fact responsive to the bill is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness, and as the plaintiff cannot prevail if the balance of the proof be not in his favor, he must have circumstances in addition to his single witness in order to turn the balance.
>
> Clark's Executors vs. Van Riernadyk, 9 Cranch, page 160.
>
> U. S. Supreme Court Rep., 3 Law Ed., page 153.

Under the former rules of practice the complainant could avoid the force and effect of such evidence by waving an answer under oath, the theory being that if the answer was not sworn to it did not become evidence, and it was necessary in order to avoid the effect of such evidence that the complaint especially waive answer under oath.

Equity Rule 41, Rules of 1842.

Union Bank vs. Geory, 5th Peters, Page 99.

The rule was a restatement of the former practice in chancery.

Foster's Federal Practice, 5th Ed., Vol 1, Sec. 153.

Cooper's Equity Pleadings, page 325.

Storie's Equity Pleadings, Sec. 874.

Where an answer to a bill in equity is direct and positive and under oath, and denies the allegations of the bill, and an answer on oath is not waived, the complainant **will not be entitled to a decree** unless such denials are disproved by more than one witness, or by one witness and corroborating circumstances; and this is so where the bill is filed for fraud.

Southern Development Co. vs. Silva, 125 U. S. Supreme Court Rep., 247, 31 Law Ed., page 678.

Where the answer denies allegations of fraud and is responsive to the bill and the relief which is asked

can be granted, these denials must be overcome by the satisfactory testimony of two witnesses, or of one corroborated by circumstances which are equivalent in weight to another.

Susan Vigel vs. Susan Hopp, U. S. Sup. Court Rep. 26 Law Ed., 765.

The question here presented is whether or not by the promulgation of the Rules of 1912 this rule of evidence has been changed. Foster, in his Federal Practice, 5th Ed., Vol. 1, Sec. 153, page 553, says:

> "Nor do the rules of 1912 prescribe the effect of an answer under oath. Until the matter has been adjudicated the prudent practitioner should follow the former practice and insert in this part of the bill a waiver of an answer under oath, unless he wishes to examine the defendant upon interrogatories, the effect upon which of such a waiver is still unsettled."

We are unable to find where there has yet been an adjudication upon the point, but respectfully call the Court's attention to the case of Campbell vs. N. W. Eckinton Imp. Co., found in the U. S. Supreme Court Reports, 57 Law Ed., at page 1330, and which case was argued and submitted on April 23-24, 1913, and decided June 9, 1913, and at a time subsequent to the promulgation of the Rules of 1912, in which the Supreme Court of the United States approvingly

quotes the former rule and makes application of it to the case then decided.

This rule of evidence respecting the sworn answer under the former practice was not confined to bills of discovery alone but was a general rule applying in all cases. In Hughes vs. Blake, U. S. Supreme Court Reports, 5th Law Ed., page 303, the rule is laid down as follows:

> **"A decree can not be pronounced on** the testimony of a single witness unaccompanied by corroborating circumstances against the positive denial by the defendant of any matter directly charged by the bill."
>
> "It may be stated as a general rule that positive statements in a sworn answer in equity proceedings, responsive to the allegations of the bill and relating facts within the knowledge of the defendant, must be received as evidence and are deemed true and conclusive, unless overcome by the testimony of two witnesses, or of one witness with corroborating circumstances, which corroborating circumstances it has been held must be equivalent in weight to another witness. Courts of equity cannot decree against the denials in a sworn answer unless they are overcome by the requisite testimony on behalf of the complainant, but **the bill should be dismissed."**

The foregoing is a statement of the rule as laid

down in Enc. U. S. Sup. Court Rep., Vol. 5, at page 886, citing in support of the rule decisions too numerous to quote in this brief, but which are respectfully callled to the attention of the Court.

On the absence of willingness that the answer should be evidence against him, a plaintiff in equity must expressly waive the oath of the defendant in his bill.

Conley vs. Nailer, 118 U. S. Sup. Court Rep., 127. 30 Law Ed., 112.

Dravo vs. Fabel, 132 U. S., 487. Law Ed. 421.

If he fails to do this the answer must be given under oath and is evidence on bhealf of the defendant.

Conley vs. Nailer, Supra.

The case of Conley vs. Nailer, Supra, was one to set aside deeds, and one allegation of the bill was that the deeds had been procured by fraud and undue influence of the defendant over the grantor. The bill neither required nor waived an answer under oath, but the defendants answered under oath, traversing all of the averments of the bill upon which the prayer for the relief was based, and in discussing the matter at page 115 (30 Law Ed., 112), the Court used the foregoing language.

It will be observed in this case now before the Court that the complainants Crab do not follow Rule 58 of the Rules of 1912, with reference to a discovery,

but in their original bill of complaint call for a discovery **and demand answers under oath to all and singular the premises** set forth in the bill of com- In such case the interrogatories become part of the pleadings, and the answers of the defendants also become part of the pleadings.

Luton vs. Camp, 221 Fed. Rep., 424-427.

It is the contention of the defendants in this case that complainants have adopted the old rule of practice, and having not only failed to waive answer on oath, but having **expressly demanded answer under oath,** are bound by the answer as evidence in the case.

The new rules of practice do not require the answer to be sworn to. Rule 58 expressly provides the course of procedure to be had in discovery, and by such procedure separates the interrogatories of discovery, from the pleadings. Had the method prescribed by Rule 58 of the new rules been complied with by the plaintiff, there would have been no necessity for plaintiff to waive answer under oath, for by the later rules defendants would not be required to answer under oath, and the answed not being under oath would, of course, not be evidence against the plaintiffs. But since the plaintiffs have seen fit to embody interrogatories in the original bill of complaint and have themselves in said complaint and by subpoena ad respondendum **required** and **demanded** of the defendants an answer uider oath, and the de-

fendants having so answered, we are constrained to assert that it is incumbent upon them to overcome the weight as evidence of such answers by the testimony of two witnesses, or at least of one witness and strong corroborative circumstances.

The remaining question upon this point is the examination of the testimony to ascertain whether or not this has been done; and we respectfully subit, of Your Honors please, that it has not. The testimony of plaintiffs' first witness, William David Parker, (pages 110 to 115, Transcript of Record) relates solely to the destruction of the former will and to the physical condition of the deceased, all occurring some time prior to the execution of the deed in controversy.

The testimony (pages 115 to 120 of the Transcript of Record) of the physician, Dr. Douglas McIntyre, next witness called for the plaintiffs, describes the physical condition of the deceased sometime prior to the execution of the deeds, and the only testimony therein of importance is the statement found on page 118 in which the doctor says: "I don't believe if he had been left to his own initiative that he could have very well planned out anything that was at all cimplicated at any rate."

The next witness called for the plaintiff, Clarence Skelton, testifies (pages 120 to 123) that he had not seen Watts (page 122) since September or October, 1913; that often long prior to that time he gave

the deceased electric treatments, and that Watts frequently mentioned that he wanted his children to share alike in his property "from the way I understood him all the time."

The next witness called by the plaintiff, Viola Etta Wheeler, a daughter of the plaintiffs, gave testimony (pages 123 to 127) respecting the destruction of the will, and testified (page 125) that she had heard the deceased say to her father and mother, "Now on my word and honor there will be no papers and the property will be divided equal"; and on page 126, "I opened the stove and helped him up and he put it in (referring to the will), and he said, 'Now it is done and the property will be divided equal.' "

The testimony of plaintiffs Jerusha Crab and John Crab is much to the same effect. But none of them testifies to any knowledge in any manner directly supporting allegations 5, 6, 8 or 11 of their bill of complaint, and certainly not of any knowledge either of facts or circumstances sufficient to overcome the sworn answers of the defendants making denial of such allegations.

DUTY OF THE COURT TO DISMISS BILL

An exception to an opinion of the Court is only necessary when the alleged error could not otherwise appear upon the record.

Macker vs. Thomas, 7 Wheaton, 530. 5 L. Ed., 515.

Errors apparent on the record may be considered by the appellant Court, though not objected to in the Court below.

Macker vs. Thomas, Supra.

Baltimore R. Co. vs. Trustees of Sixth Presbyterian Church, 91 U. S., 127-130. 20 L. Ed., 260.

It was the duty of the Court to dismiss this bill, though objection was not made to the ruling of the Court upon plaintiff's motion.

Courts of Equity cannot decree against the denials in the sworn answer unless they are overcome by the requisite witness on behalf of the complainant.

Seitz vs. Mitchell, 94 U. S., 580. 24 L. Ed., 179.

Railroad vs. Mellan, 40 U. S., 112.

The bill should be dismissed where denials of the answer are not overcome by proper proof.

Morrison vs. Durr, 122 U. S., 518. 30 L. Ed., 1225.

Board of Public Works vs. Columbia College, 17 Wallace, 521. 21 L. Ed., 685.

In Latta vs. Kilbourn, 150 U. S., 524, 37 L. Ed., 1169, the Court said:

> "The defendant in his answer, which **was called for under oath,** positively and in direct terms denied the allegations of the bill * * * *

under the well settled rules of equity pleadings and practice his answer must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances."

SECOND

Were the deeds secured by fraud, undue influence or deception, and not made as the intelligent and voluntary act of the grantor.

IN FIDUCIARY RELATIONSHIP.

Burden of Proof

The allegations of the complaint in this cause are very ingeniously drawn and drawn with a view of establishing the fact that Homer I. Watts, the Attorney who drew the deeds, and Marvel Watts, the other brother, at the house of whom Mr. Watts had made his home, are the real beneficiaries under the deeds. Doubtless the complaint was so drawn with the idea of establishing a fiduciary relationship as existing between the father and sons, as such beneficiaries, and by so doing declare the deeds prima facia void and cast the burden of proof on defendants, under the Oregon Rule of Fiduciary Relationship. We faail to find where there is the slightest evidence tending to show that either Homer I. Watts or Marvel Watts are beneficiaries under the deeds. True, they are tenants, still farming the land under the same conditions, practically, that they have been

farming the lands under lease from Thomas J. Watts for a long number of years prior to his death. The rents have gone directly to the grantees named in the deeds and have been accounted for as strictly as though they were accounted for to Thomas J. Watts during his life time. Aside from the sworn answers, each and every of the defendants testified positively that there is not now and never has been any understanding, agreement or conversation between them whereby the title to the lands, or any interest therein, should ever be acquired by either Marvel Watts or Homer I. Watts, no evidence to the contrary has been offered by plaintiffs, therefore we cannot concede in this case that either Homer Watts or Marvel Watts occupied that confidential relation with the deceased, or interest in the result of the deeds, which is necessary to bring them, or either of them, within the general rule announced by the Supreme Court of this State in the case of Jenkins vs. Jenkins (66 Ore., at page 17), to the effect that a gift obtained by any person standing in the confidential relation to the donor is prima facia void and the burden is generally upon the donee to establish to the satisfaction of the Court that this was the free, voluntary and unbiased act of the donor. The position of Homer I. Watts is directly the reverse. He was informed by his father that he was to receive no interest in the lands (Page 157, Transcript of Record). Reasons were given why, he was expressly requested and directed to draw the instruments and his father placed him upon honor that he would not cause

any trouble by reason of the manner in which he disposed of the property by deed (158).

True, his father advised with him as to how the deeds should be drawn in order to protect his life interest, but his instructions as to the manner in which he wanted to dispose of his property were peremptory, thoroughly understood, discussed at different times and the reasons fully given to Homer I. Watts why neither he nor his brother should receive or take any of the lands described in the deeds. It cannot be said that either Homer I. Watts or Marvel Watts were the agents of the grantees in the deed while they were being procured, or in the process of the procuring of the deeds to be executed.

Homer Watts acted solely and exclusively under the directions and at the instigation of his father (156). Marvel Watts had no knowledge that the deeds were to be executed, or that they were executed until they were delivered to him next day (197). Neither Vernita Watts (243) nor Jennie Anderson Watts knew anything of the disposition of the property until after the deeds had been fully executed.

POINTS AND AUTHORITIES.

Burden of Proof.

Even though a fiduciary relationship existed between the deceased and any or all of the defendants, the Court was in error in finding and holding (page 90, Transcript of Record) that the burden of proof

was cast upon the defendants to prove the validity of the deeds.

"The burden of proving undue influence in a gift from an aged woman to daughters with whom she lives alternately, rests upon the plaintiff who brings the action to set the gift aside."

Towson vs. Moore, 173 U. S. Sup. Ct. Repts. 17. 43 L. Ed., 597-600.

Mental Capacity.

"Neither age nor physical weakness and debility, nor disease of the body, will affect the capacity of a person to make a valid testamentary conveyance if sufficient intelligence remains so that such person understands the nature and effect of the conveyance."

Meyer vs. Jacobs, 123 Federal, 900.

Bowdoin College vs. Merritt, 75 Fed., 480-487-492.

"In determining the competency of the grantor to execute a deed, the question is not whether or not his mental powers were impaired or whether or not he had ordinary capacity to do business when he executed it, but whether or not he had any—the small-

est—capacity to understand what he was doing and to decide intelligently whether or not he desired to do it."

Sawyer vs. White, 122 Fed., 223.
Mann vs. Kane, 86 Fed., page 51.
Ragan vs. Sabin, 53 Fed., 415.

"That the grantor in a deed was in a declining state of health and his constitution greatly weakened when he executed the deed does not necessarily imply an absence of sufficient capacity to dispose of his property by gift or otherwise."

Ralston vs. Turpin, 129 U. S., 663-670. 32 Law Ed., 747-750.

"Mere mental weakness will not invalidate a contract or gift unless the grantor or donor be **non compos mentis.**"

Bigelow on Fraud, 281.

"Where a testator at the time he executes his will understands the business in which he is engaged, has knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he

possesses testamentary capacity, notwithstanding old age, sickness, disability or extreme distress."

In re Diggins Estate, 76 Ore., Page 341-345.

"Not every degree of insanity of a testator will vitiate a will, and though he be enfeebled physically and mentally, if he can understand at the time of the execution of the will what he is doing, has knowledge of his property and how and to whom he wishes to dispose of it, and remembers those who have claims on his bounty, he is of sufficient testamentary capacity."

Stevens vs. Myers, 62 Ore., 372-381.

"One in such mental condition as to understand what he is doing, recall what property he owns and intelligently select the object of his bounty, possesses testamentary capacity."

In re Hart's Will, 65 Ore., 263-265.

The deceased, Thomas J. Watts, was possessed of a disposing mind.

Opinion of Judge Wolverton, Transcript of Record, 94.

Undue Influence.

"Confidential relations existing between the parties to a transaction do not alone furnish any presumption of undue influence to defeat a conveyance * * * * something more than the natural influence springing from such relationship must be shown, imposition, fraud, importunity, duress or something of that nature must appear."

Mackall vs. Mackall, 135 U. S., 167-172. 34 L. Ed., 84-86.

"The undue influence for which such transaction will be set aside must be such that the party making it has no free will, but stands **in vinculis.** It must amount to force and coercion destroying free agency."

Conley vs. Nailor, 118 U. S., 127-134. 30 L. Ed., 112.

"It has more than once been recognized by this Court that the influence for which a deed will be annulled must be such as that the party making it has no free will, but stands **in vinculis.**"

Towson vs. Moore, 173 U. S., 17-22. 43 L. Ed., 593.

Mackall vs. Mackall, 135 U. S., 167-172-173. 34 L. Ed., 84.

Ralston vs. Turpin, 129 U. S., 663-670. 32 L. Ed., 747.

"Influence gained by kindness and affection will not be regarded as 'undue' if no imposition or fraud be practiced, even though it induces one to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.

Mackall vs. Mackall, U. S. Sup. Court Repts., 34 L. Ed., 84-86.

"It is not influence, but **undue** influence that is necessary to overcome a will."

Beyer vs. LeFever, 186 U. S., 114-124. 46 L. Ed., 1080.

"The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affections, confidence and gratitude of a parent to a child which inspires a deed or gift is natural and lawful and will not render it voidable unless that influence has been so used

as to confuse the judgment and control the will of the donor."

Sawyer vs. White, 122 Fed. Rep., 223.

"Undue influence must destroy free agency. It is well settled that in order to avoid a will (or deed) on the grounds of undue influence it must appear that free agency was destroyed and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not in fact express his wishes as to the disposition of his property, but those of the person exercising the influence."

Mackall vs. Mackall, Supra, page 86.
Meyer vs. Jacobs, 123 Fed., 900.

"Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the Federal Courts that the will of a person found to be possessed of a sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence."

Beyer vs. LeFever, 186 U. S., 114. 46 L. Ed., 1080-1085.

An unmarried man seventy-seven years of age

and in feeble health, deeded his farm to his nephew on the expressed consideration of $1.00 and other considerations, the deed reserving to the grantor a life estate, * * * * * * * subsequently the grantor returned to the farm and commenced suit for cancellation of the deed. He was shown to have been mentally competent and there was no evidence of coercion or undue influence. The deed was sustained.

McElroy vs. Mastuson, 156 Federal, 36.

"To invalidate a will on the ground of undue influence, it is not sufficient to show that a party benefitted by it had the motive and opportunity to exert such influence. There must be evidence that he did exert it and so controlled the actions of the testator to such an extent that the instrument is not his will."

Hubbard vs. Hubbard, 7 Or., page 42-46.

"Undue influence sufficient to set aside a will must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the purposes of another instead, and must be the efficient cause of the disposition of his property."

In re Diggins Estate, 76 Or., 341.

THE TESTIMONY.

Mental Capacity

Concerning the mental capacity of the deceased, we briefly quote from the Transcript of Record:

SAMUEL HUTT testified: Got acquainted with Thomas J. Watts in 1902. Saw him once or twice a week when he was in Athena; sometimes may be oftener. Saw him in an automobile on Main Street in Athena in front of Hawks' Drug Store at a time after he was brought back from Washington and taken off the train at Athena. Watts spoke to him as he always did. Watts was sitting up in the automobile. The witness drove up close to him, leaned over to him and said, "How do you feel, Uncle Tommie?" Mr. Watts answered, "I feel fairly well. I feel good, how do you feel, my boy?" That Mr. Watts always called him his boy. Mr. Watts asked him at that time how his family was. He did not notice any difference in the mental condition of Mr. Watts at that time that he had noted any other time. Mr. Watts spoke to him as he always did and there was nothing at all about his actions or his conduct or his language that indicated he was not perfectly intelligent and in good mental condition. He appeared just the same that day as he ever did to me. (Pages 213-214, Transcript of Record).

GUY JONAS testified: I was a witness to both of the deeds. Signed my own name there on in the presence of Homer Watts and T. J. Watts. T. J.

Watts said to Homer, "Did you fix the papers?" Homer said, "I have got them in my pocket." Homer then read them to his father, who corrected him on one piece of property, saying, "You haven't that right," and described the land himself to Homer. Homer told his father that was the way he had it, and his father said, "Well, go ahead and read them again." Homer read them again and his father said, "That is the way I want them deeds fixed." Homer said "Guy can sign that all right," (referring to witnesses). His father said "That is all right enough." His father kept the deeds in his lap awhile, then handed them back to Homer; told him to give them to Marvell and have them recorded. Watts told him he had enjoyed the ride with Homer. That he had often talked to Watts around the hotel and met him on the streets and talked to him. That he did not observe any difference in the general condition of Watts the day he saw him make his mark to the deeds than when he had noticed before, only that he was sick, complained of being sick. As far as his conversation is concerned, it ran just as it always did ever since I knew him. (Pages 175-176-177, Transcript of Record).

DR. S. F. SHARP: Graduate of medicine from Jefferson Medical College in Philadelphia. Had known Thomas J. Watts ever since about the year 1897. Knew him well. Treated his family the greater part of the time up to his death. Saw him when he returned from up in Washington, about the

12th of April. Watts was very feeble, weak and exhausted, suffering from a general break down. Did not talk to him much that day. Saw him every day thereafter until his death. Saw no change in him until the Thursday after he had been out in the automobile, after which Pneumonia gradually set in and caused his death. Watts always knew him and recognized him. He did not notice any difference in his mind from what it had been a year or two before that time, and he seemed rational, perfectly rational. He noticed Watts was perfectly rational up to about Friday—Thursday or Friday before his death. (Page 192, Transcript of Record). **His mental condition was good.** (Page 193, Transcript of Record).

DAVID TAYLOR: Been a resident of Umatilla County since 1859. Got acquainted with Thomas J. Watts about September, 1870. Saw him often. Met him at church and different places. Associated with him about as much as anyone else in early days. Saw him a good many times after he was divorced. Would call and see him when he was not well. Talked with him in March, 1914, after he returned from California. Watts told him then that if Homer did not look after him better or did not pay more attention to him he did not know that he was satisfied with the will and did not think he was satisfied with the will. Said Marvell's wife would crawl on her hands and knees upstairs to wait on him. That Marvel had no bed room downstairs and that he could not get up the stairs very well. That Marvel's wife was sickly

and that Vernita was not able to wait on him. That he was going to have a talk with Homer and his wife as to why they could not take care of him. Saw him again after he returned from up in Washington to a visit with his daughter. I said "Hello, Uncle Tommie, you are home again?" Watts replied "Yes, I have come back, Dave." Watts said, "I have been out riding. Homer taken me out riding. We started out to the ranch, but didn't get out there though. I am a little tired, but think I am all right after I get rested up." That this conversation with Mr. Watts was in the afternoon. That he saw him again a day or two after that and that Watts then said to him, "I sent for Lizzie today and she came down. I told her if I had ever done her any harm or wrong I was sorry of it and asked forgiveness, and she said she would forgive me," and that Watts further said that he told her if she did not have plenty to keep her as long as she lived he would make arrangements, and he further said "Marvel told me she had plenty and Homer told me she had plenty." He said he didn't know how long he would live, "None of us are going to live very long. We are all getting old." That he could not see any difference in the condition of the mind of Mr. Watts, except that he supposed his mind was growing a little weaker as his body did. That he seemed to have just as good a mind as he ever did, to my notion. That it took Watts a little longer to get out anything, to express it, but that he talked just as rational as he ever did, and that this condition was true the day Watts told him he had taken a ride

with Homer, and was also true of his other conversations he had with him. (Pages 182, 183, 184, Transcript of Record).

LINDEN VINCENT: I had a jewelry store in part of the Hawks' Drug Store. Would see Mr. Watts in the drug store. Would listen to his stories and got pretty well acquainted. Saw him for the last time six or eight days before his death, in an automobile in front of the drug store in Athena. The store where he had his jewelry shop. Had a conversation with Mr. Watts. Mr. Watts told him he had been pretty sick, but was feeling better. "I got outside and I feel brighter." Talked to him several minutes. Mr. Watts gave Byron Hawks, the druggist, an order for something. I went into the drug store and brought out the package which Mr. Hawks had fixed up for Mr. Watts. That the condition of his mind appeared to be very bright for a man of his condition. I would consider it very bright. His conversation was just about the same as usual. I did not observe any difference in his mental condition. He seemed just about the same as ever to me, because I stood there quite a little bit. (Pages 238-239, Transcript of Record).

MRS. HOMER I. WATTS: Became acquainted with Thomas J. Watts in 1904. He lived with her and her husband part of the time. Remembers the occasion of Mr. Watts being brought to her home in April, 1914, from Washington. On the next day, Sunday, his divorced wife was there the greater part

of the day, and also David Taylor. Remembers about Mr. Watts being out automobile riding. That Guy Jonas came to their house. That on the day Mr. Watts was out automobile riding he seemed the same that he always had to me. Didn't notice any change in his mental condition at all until Friday or Saturday, when he began to get rather droopy. On Saturday he didn't seem to realize what was going on and died on Monday. Heard Thomas Watts ask his divorced wife while she was there on Sunday if she was sure she had plenty to take care of her, and she heard her tell him she had, and that if she did not have the boys would take care of her. (Transcript of Record, pages 220-221).

HOMER I. WATTS: On the 14th day of April, 1914, in the afternoon, at home in Athena, I wrote deeds for my father. (Marked for identification Defendants' Exhibits "B" and "C"). His father came to his home from Jerusha Crab's on the 11th day of April, 1914, was given a bath by the witness and told him about the will being destroyed, and among much other conversation said, "I have made up my mind what I am going to do with my property, as I suggested some time ago; that is, going to give a part of it to your mother and I am going to provide for Vernita because she is a cripple, and Marvel's wife. The balance of it I am going to leave to pay up the debts, and I hope you children will get good friends, because you all have enough property. Let property not divorce you children any longer." That was on

Saturday evening, and he further said, "I want your mother to come over tomorrow." The witness overheard part of the conversation between his father and mother. His father said to his mother, "Now Lizzie, your time and my time for life is not very long. I have made up my mind to provide for you so you will not want. My suffering during the last years has been intense. I want you to have every care that can be cast upon you," and asked her forgiveness, and she asked the same thing of him. His father wanted to know of her how much property she had and she told him she had plenty to keep her, and that the boys had been good to her, and that she did not know that she cared about property at all. She said, the children that have made it are entitled to it and I would just let it go that way. That the same evening or the next morning his father stated to him that he had thoroughly decided what he would do with his property, and wanted him to fix the deeds. Is under the impression that on Monday morning (or it might have been Tuesday morning) I asked him to go down town with me, if he would not go. He said he wanted me to—why couldn't I fix them up and bring them up there. He said that he had intended to give the lower place, that is, the 320 acres that was deeded to Vernita, to my mother so that she could have the income of it during her life time, and the remainder over to the little girl. His father then directed him how he wanted the deeds drawn. He wanted to deed some land to Vernita be-

cause she was a cripple and she has been closer to me, possibly, than anyone else in life during my old age, being around me so much; and he wanted the other deed fixed so that Marvel's wife would take the title to the property, and I will take the income off of it, because that will be plenty to keep me, and that there would be 80 acres left with which to pay the debts, and said, "Now Homer, Jerusha understood how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel. I want you to attend to it and attend to it right." About eleven o'clock Tuesday came back to take father to the office and fix up the deeds, expecting to get LeGrow to draw up the deeds or to witness them. Got nearly to the bank, saw LeGrow leaving. Continued for a ride a distance of about five miles. Talked with father at some length about the property. Got back home between twelve and one. His father was placed in the chair by the stove where he ate his dinner. When he started away his father asked him to bring back the deeds. I read each deed separately. Discussed the deeds with him,—the description of the property. His father said, "That is the way I wanted the property fixed." His father took hold of the pen, but his hand was crippled and he said to witness, "Write the name for me." His father gave the deeds to him and told him to give them to Marvel Watts or record them. That he took the deeds to his office and gave them to Marvel the

next day. (Pages 149, 150, 151, 152, 153, Transcript of Record).

He further testified that when he and his father went out to the Mansell sale, about the first of March, his father told him he was going to give Vernita some property. That either on the Sunday evening or Monday morning when his father told him how he wanted deeds written he said to him, "Homer, you have no children and Vernita is the only grand child I have here, and she is a cripple, and I have been wanting them to doctor her some, and offered to pay her doctor bills if they would doctor her more. I am willing to doctor that girl." He further said to witness, "You can make it first rate in life, you are getting along well," and further said, "Marvel's wife has been better to me than ever my mother was and she is certainly entitled to something for the kindness she has shown me." That his father had made up his mind absolutely, without any suggestion on his part. (Pages 173, 174, Transcript of Record).

MARVEL WATTS: Mentally I did not see anything the matter with him at all. His physical condition, of course, was not very good. (Page 200, Transcript of Record).

GEORGE WINSHIP: Employed in the First National Bank of Athena; knew Thomas Watts ever since he was old enough to remember; saw him the last time two or three days before he died. Saw Mr. Watts sitting in Homer's car in front of the drug

store. Watts told him he was taking a ride. "I think we will go out on the reservation." He just talked to me just the same as he ever did since I have known him. (Pages 250, 251, Transcript of Record).

A desire to remember Vernita Watts and Jennie Anderson Watts was expressed prior to going up into the State of Washington.

TESTIMONY.

HOMER WATTS: When I and father went to the Mansell sale about the first of March father said he was going to give Vernita some property. (Page 173, Transcript of Record).

MARVEL WATTS: It was the summer before he went to California when father asked him what he thought of remembering the wife of witness, and also spoke about the mother of witness. (Page 198, Transcript of Record.)

A firm mind that Jerusha was not entitled to share in his property.

The Will of 1899.

B. B. RICHARDS: Am Justice of the Peace and City Recorder. Saw Watts almost daily. Drew a will for him in the fall of 1899. The will provided that Jerusha Crab should receive $100.00. (Page 215, Transcript of Record).

The Will of 1905.

WILL M. PETERSON: I drew a will for Thomas

J. Watts on the 25th day of November, 1905. The will gave Jerusha Crab $10.00. (Transcript of Record, page 222).

The Will of 1910-1911.

B. B. RICHARDS: I drew another will for T. J. Watts in 1910 or '11. It left Jerusha Crab less than $500.00. Dr. Newsom was one of the subscribing witnesses. (Page 216, Transcript of Record).

G. S. NEWSOM: Two Hundred Dollars was left to Jerusha Crab in this will. (Page 217, Transcript of Record).

JERUSHA CRAB: The will was in very large print-hand write—and I could read it all. I stood behind his chair and saw every word that was in it. It gave me $200.00. (Page 132, Transcript of Record).

Testimony.

JENNIE BARRETT: Am the wife of Senator Barrett. Have known Thomas Watts since I was about thirteen years old. Watts told me he had made his will, had given his property to Homer and Marvel, share and share alike. The first wife died, leaving a little girl who had inherited what one of his brothers had left. (Transcript of Record, 237).

Dr. S. F. SHARP: Heard Watts speak about what he was going to do with his property in the latter part of his life, and that he would speak about giving it to the boys except a little he was going to

give to his daughter. Heard him speak about it several times. (Page 193, Transcript of Record).

WILL M. PETERSON: Watts told me at the time I drew his will that his brother had raised his daughter, Jerusha, and that the brother would make or had made some provision for her. (Transcript of Record, page 222).

DAVID TAYLOR: Watts said he did not consider that Jerusha should have an equal share in his property and that as he remembers it Watts told him he had given her $200.00 in the will, and divided the balance of the property equally between the boys.

HOMER I. WATTS: Deceased said to witness, "Now Homer, Jerusha understands how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel. (Pages 151-152, Transcript of Record).

Reason why property was deeded to Vernita and Jennie Anderson Watts:

TESTIMONY.

DAVID TAYLOR: I heard Watts say that Marvel's wife would crawl up the stairs on her hands and knees to wait on him when she was not able to do so, and that she would do everything she could as long as she had strength. (Transcript of Record, page 184).

HOMER I. WATTS: Father said he wanted the deeds drawn, saying that he would deed some land to Vernita because she is a cripple and that she had been closer to him possibly than anyone else in life during my old age, being around me so much. (Page 151, Transcript of Record). Homer, you have no children and Vernita is the only grand child I have here and she is a cripple, and I have been wanting them to doctor her more, and offered to pay her doctor bills if they would doctor her more. I am willing to doctor that girl. And further said to witness, Marvel's wife has been better to me than ever my mother was and she is entitled to something for the kindness she has shown me. (Transcript of Record, Page 173, 174).

ARGUMENT.

It needs no citation of authorities to support the proposition that a person of legal age and possessed of mental capacity to understand the nature of a transaction, may dispose of his property during his life time by gift or otherwise, to whomsoever he pleases. Heirs have no rights except in property possessed by the deceased at the time of his death. He may during his life time and while possessed of the necessary faculties dispose of his property by gift, even to the extent of beggaring himself and depriving his family thereof. He may make certain persons the beneficiaries of his generosity to the entire exclusion of others and may select whomsoever he pleases as the objects of his charity.

The instruments appear to be regularly executed and the District Court found them to have been executed by the deceased, and that he was probably of a disposing mind, and the pivotal question to be determined is largely—in fact, almost exclusively—one of fact, to be determined by the Court from the evidence in the case as to whether or not the deeds were the offspring of the mind of Thomas J. Watts at the time he caused them to be executed, and whether or not at that time he fully understood the nature of the transaction and acted of his own free will, without influence from outside sources.

It is true and admitted in this case that the old gentleman was advanced in years, eighty-two years old, very feeble in body at the time of the execution of the deeds, but it seems apparent from the overwhelming testimony in the case that he disposed of the property just as he wanted it to go. That others may have had an opportunity of trying to influence him seems to us to fall far short of any proof that they did do so. As said in Beyer vs. LeFevre, supra:

> "Whatever rule may obtain elsewhere, it is the rule of the Federal Court that the will of a person found to be possessed of a sound and disposing mind and memory will not be set aside on evidence tending only to show a **possibility** or **suspicion** of undue influence."

And we submit that the most that appears in this case is an opportunity, or possibility, for defendants

to have exerted such influence had they so desired. Proof that they or any of them did do so is entirely lacking.

We will first discuss the relations existing between the old gentleman and the plaintiff, Jerusha Crab. When we take into consideration the fact that his home was never her home, that she was never really a member of the family who resided upon the lands in controversy or who helped to improve or accumulate them, we have one reason why, in the mind of the old gentleman, it was not proper that she should inherit or receive part of those particular lands. T. J. Watts had often expressed himself as believing that the boys, who had helped accumulate the property, should receive this particular property.

When we further consider that it was the understanding that the uncle of Jerusha Crab, Marvel Watts, was to leave to her, and did leave to her, a large portion of his property; that all of her services during her girlhood and early womanhood were devoted to his care and his comfort and the upbuilding of his property, rather than to the property of deceased, we find another reason why Thomas J. Watts should consistently say to himself and to others that she was not entitled to receive the property which he and the boys and his second wife had accumulated.

It is a cardinal principle of interpretation of the acts of a donor that former expressions with respect

to the disposition of his property may be taken into consideration and have a strong bearing upon the validity of an instrument executed under circumstances similar to these in controversy.

A strong circumstance tending to show,—in fact, to our minds, one which does conclusively show that the donor, T. J. Watts, never intended that his daughter, Jerusha Crab, should receive any of the lands now in controversy is that repeated wills have been made wherein her name was mentioned and in each instance excluding her from any substantial participation in the property involved here.

Let us briefly refer to the wills and their contents: The first will was made in .1899, when Mr Watts was undoubtedly in vigorous health and of clear and intelligent mind and memory, unaffected by the ravages of any disease. This will was executed before B. B. Richards at Athena and by the terms of this will Jerusha Crab was given one hundred dollars, and no more. Certain provisions are made for the then wife of T. J. Watts, and the remainder of the property was distributed among the boys. None of the relatives or others were present at that time, and it must be conclusive that the old gentleman at that time acted freely and voluntarily, and knowingly disposed of his property without any substantial remembrance of Jerusha Crab.

The second will was made on the 25th of November, 1905, and was executed in like manner before

Will M. Peterson. This also was made at a time when there is no question of the capacity of Mr. Watts to dispose of his property in the manner he desired. At that time, some six years later than the first will, he still had in mind that Jerusha Crab should not participate in his property to any material extent, and provided that she should receive ten dollars and no more.

This is particularly remembered by Mr. Peterson, because at that time Mr. Watts explained fully why he did not intend for Jerusha Crab to receive any more. She had inherited or was expected to inherit a large estate from her uncle and the maker of the will went into detail, fully explaining his reasons for the small amount bequeather to her.

And again, a third will was executed before B. B. Richards in the fall of the year 1910. Mr. Richards in his testimony does not remember definitely the date, but says it was in the fall of 1910 or 1911, but he executed it, as described by the witness Jerusha Crab herself in her testimony at page 113, where she says she read the will over Mr. Watts' shoulder, and the date was November 25, 1910, and that the amount left to her was $200.00, and the remainder was to be divided between the two boys. Thus, some five years later than the second will, a third will was executed, and at this time Jerusha Crab was given $200.00 and the real property was divided between the two boys, Mr. Watts and his second wife having separated in

the mean time, and provision having theretofore been made for her through settlement.

Thus from 1899 up to the last of 1910 we have three written instruments from T. J. Watts, in which he has fully expressed his intention of disposing of his property without Jerusha Crab receiving any substantial part thereof.

Aside from these written expressions, we have repeated statements made by Mr. Watts of his intentions respecting Jersusha Crab, and made to persons entirely disinterested and who can have no interest in this case whatever other than to tell the exact truth. We will first refer to the testimony of Mrs. Jennie E. Barrett, wife of the Senator, Charles A. Barrett, and an old friend and acquaintance of the deceased Thomas J. Watts. She testified in substance, beginning on page 555 of the abstract of testimony, substance at page 237, Transcript of Record:

I have been acquainted with Thomas J. Watts since I was thirteen years old. He talked with me about his children and his property.

And at page 556 she answered: After he was separated from his wife, his second wife, he came one forenoon by the house and I was in the yard working; he stopped to talk with me as a neighbor would and he said he had made his will; first he was telling about being left alone and he said that at first his wife was not satisfied with the will, so the boys

told him to give her what would please her; he said that he had arranged it to please her and that what he had left he should give—had made his will and would give it to the two boys, or had given it to the boys Homer and Marvel, share and share alike. He said that when his first wife died he had a little girl and that his brother and his wife had no children, that they had asked him to let them take the child and that if he would let them adopt it they would make it their heir and give it their property as if it was their own child, and he had consented to do so and that was the reason he was giving to the boys what he had left. That she had inherited what his brother and his wife had left when they died, and for that reason he would not give her anything.

We next beg to cite Your Honor to the testimony of David Taylor, an old and respected pioneer of this County, a man without the slightest interest in this cause other than to tell the truth, a man who had had an intimate personal acquaintance with the deceased and church affiliations and associations with him practically from the date of Watts' first arrival in the County in 1870 up to the very date of his death.

Mr. Taylor had a talk with Mr. Watts after his return from California the last time and before he went to visit his daughter Jerusha, in the spring of 1914, in the month of March, 1914. We refer to page 305 of the record of evidence, page 180, Transcript

of Record. The witness testified in substance in part:

He talked on and he told me about making a will. Did not say when he made the will. He went on and said he had made a will and it was down in the bank. He said he had willed, as I understood it, he willed that girl that lives in Palouse $500.00, and Homer and Marvel the rest equally divided between them; that was the will. And he said if Homer did not look after him better or pay him more attention that he did not know that he was satisfied with the will; he didn't think he was satisfied with the will. He talked quite a bit and he said that Marvel's wife would crawl on her hands and knees upstairs to wait on him, and we talked on just that strain.

And on page 313, Transcript of Evidence, Page 183, Transcript of Record: No, I don't think we ever talked about the will only there at Marvel's house. He told me he had made a will and told me what was in the will.

Q. Now did you ever have any talk with him about the daughter Jerusha?

A. Yes, sir.

Q. And his feelings toward her, talk about that?

A. The way I have got it in my noggin is, the first wife died when that girl that lived in Palouse was about three years old, and his brother said he would take that child and adopt it and raise it and make it

an heir of his. He said his brother had a section of land somewhere down there, and he kept the girl and raised her and he said the girl had a good deal of property and the boys helped him raise, had helped to make this property, staid at home and worked, and he thought she was not entitled to it as much as the boys, some thing to that effect. He would talk about it that way, and he said he considered she was the heir of his brother and he did not think it was necessary to give her much of his estate.

Q. Now do you recall about when you had that conversation with him, or would he talk that way more than one time?

A. Well, I should say now it was the time he told me about his will, that same conversation that came up there at Marvel's house.

Q. That was after his return, then, from California and before he made this trip up to Jerusha's?

A. Yes.

And again we call attention to his statement to his old family physician, the one who treated him up to the time of his death and who had treated his family during many years last past, Dr. S. F. Sharp. We refer first to page 356 of the Transcript of Evidence, page 191, Transcript of Record: The Doctor testifies: I have heard him speak about his property.

Q. Well, just state what you recall having heard

him say in the latter part of his life about his property.

A. He used to speak about giving it all to the boys except a little he intended to give to his daughter.

And on page 357:—Page 193 of Transcript of Record:

Q. Then at the time of his own death he had how many children surviving him?

A. Two boys left.

Q. Are you acquainted with Jerusha Crab, his daughter?

A. Yes.

Q. How long in his life, if you recall, did he talk to you about what he would do with his property?

A. He spoke about that several times during the last years before he went to California, to me.

Q. Now did you ever hear him say anything different about the matter than what you have already testified?

A. No.

Thus we have numerous instances, both in the form of written wills on three different occasions widely separated from each other, and conversations ranging from the year 1899 up to the month of

March, 1914, and within thirty days of his death, wherein he had expressed the firm conviction that Jerusha Crab was not entitled to receive any material amount of his property, and this in itself would require and take strong evidence to effect its overthrow and cause a change to be made within a period of a few days, wherein and whereby he should be led to conclude that Jerusha Crab should share equally with others in his property. These often expressed opinions show a fixed and settled purpose, at least with reference to his feeling and attitude toward the plaintiff Jerusha Crab. It was not that he had any hatred toward her. It is not such a condition that might call forth an expression of forgiveness for some wrong, either fancied or real, and cause him to divide his property that way as a matter of restitution or forgiveness, but it was a firm conviction brought about in his mind from a full knowledge of all of the situation, and after long thought and deliberation, and with a full realization that Jerusha Crab's home had ever been elsewhere. That she had received from her uncle, to whom she had given her early life services, a large portion of his estate, augmented, doubtless, by the fact and knowledge that after her marriage to her husband they had accumulated a large amount of property and were well-to-do, which caused him to believe that it would be unjust for her to share in his property to any material extent.

He doubtless also during all of these years bore

in mind the fact that he and his second wife, the mother of his boys, together with the boys, had spent many days of hardship, toil and deprivation in building up the home places in Umatilla County, and had a full realization that the boys should be entitled to it rather than her. And yet there came a time, no doubt after strong solicitation, pleading and manouvering upon the part of the daughter, accompanied, perhaps, by threats of litigation fostered by expressions, possibly, of ill will between the boys and the daughter, which led him to believe, as he subsequently expressed himself, that each of his own children would be better off if the property were disposed of to some one else who, at least in a measure, merited his benificence, and both the boys and the girl were left without an opportunity, as he conceived it, for litigation, ill will and hatred over the disposition of his property after his death, and imbued with this belief, it was but natural that he should seek for and find what, in his mind, seemed to be a proper and just disposition of his property and a method of disposing of it which would forever, as he conceived it, prevent litigation and turmoil.

There is some evidence that the will which he then had in the bank at Athena and with which he seemed to be perfectly conversant was not satisfactory, not as we view it, because it did not provide sufficiently, in his opinion, for the plaintiff Crab, but, for one reason, because he felt that Homer and his wife were not treating him right. Another rea-

son that doubtless passed through his mind was the feeling just referred to, that much ill will between his children might be avoided if the property were placed elsewhere. While he doubtless felt that Homer and his wife were not entitled to receive any of his property, he perhaps also felt that it would not be just to give either of his other children any of the property and leave Homer entirely out.

We are not left entirely to conjecture in this matter. In March, 1914, and just before he went on his last visit to his daughter Jerusha, he gave expression to his thoughts with reference to this matter in his conversation with David Taylor, page 305 of Evidence, page 181 Transcript of Record, in the following language:

"He said he did not know what was the matter with Homer, Homer Watts and his wife; he said Homer did not seem to take any interest in him, did not care for him; he passes along going up home and he don't come in to see me, and he says, I'm going to have a talk with Homer and his wife and see what is the trouble. He talked on and he told me about making a will, didn't say when he made the will; he went on and said he made a will and it was down in the bank * * * And he said if Homer didn't look after him better or pay him more attention that he did not know as he was satisfied with the will. He didn't think he was satisfied with the will."

Here is a clear expression of the reason that he

was not satisfied with the will; he was not satisfied with the portion that Homer was getting, not satisfied that Homer should receive any of his property by reason of Homer's treatment of him.

This conversation, it will be borne in mind, took place just immediately prior to his going to his daughter's the last time, but it seems that this was not the only time that such feeling entered the mind of Mr. Watts. Dr. Sharp, at page 357, page 193, Transcript of Record, testifies:

Well, I never heard him say anything only in regard to Homer and his wife. He didn't like them very well. He didn't like them. He thought they had not treated him quite right.

Q. What is that?

A. He thought Homer and his wife had not treated him quite right. He would often speak about that.

And then, according to the testimony of Mrs. Crab, the very next morning after his arrival at her home, and without any persuasion or talk with her concerning it, he made a request that she send and get the will because it did not suit him. The letter requesting the will was written by Mr. Parker on the 24th day of March, almost immediately after Mr. Watts' conversation with Taylor, in which he expressed a feeling that he was not satisfied the way Homer and his wife were treating him.

Now doubtless there was much talk between the Crabs, or at least some of them, and Mr. Watts during the ensuing days that he remained there, concerning his property. While upon the surface the testimony of Mrs. Crab would show that she was disinterested and was only listening to the old gentleman talk, yet it is not conceivable that this is true. Too much interest is displayed by Mrs. Crab and by her daughter in listening to conversations from the kitchen and from the parlor concerning the property, to believe for a moment that it was immaterial to them what the old gentleman did with his property. Enough was evidently said to cause the old gentleman to expect that there would arise from the disposition of his property a hatred and feeling among his own children which ought to be avoided if possible. Then is it unnatural or unreasonable that he should seek for a method of disposing of it that would best accord with his ideas, and is it unnatural in so doing that his mind should return to the little grand- daughter, the crippled girl who had waited on him for years, who had been his pet, in a manner, about the home of Marvel Watts? He had bought for her other presents, showing his affection,—a Shetland pony I think the testimony discloses, and had told her father to spare no expense to try to cure the invalid girl and to use his money for that purpose. ~~It is~~ Is it unnatural or unreasonable that his mind should turn to the one woman of all others, the wife of Marvel Watts, whom he had

said would "Crawl upstairs on her hands and knees to wait upon him, though she was not able to do so?" To the woman who would forget her own physical weakness in order that she might minister to his wants, and had done so for years? It is the most natural thing to our mind that he should select as the objects of his bounty and as the medium through which he might harmonize his own children, the two persons whom he did select, the wife of his eldest son and her invalid daughter.

The language of Mr. Justice Brewer in the case of Mackall vs. Mackall (U. S. Sup. Ct. Dep., 34, Law Ed., page 87) comes to us with peculiar force at this time. It is this:

> "Right or wrong, it is to be expected that a parent will favor the child who stands by him and give to him rather than the others his property."

And the Chief Justice in the same opinion and in support of the decision in that case makes the following statements:

> "Influence gained by kindness and affection will not be regarded as undue if no imposition or fraud be practiced, even though it induces the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.

> "Confidential relations existing between a testator and beneficiary do not alone furnish any presumption of undue influence, nor does the fact that the testator on his death bed was surrounded by beneficiaries in his will, nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, his other children having forsaken him."

And the Chief Justice in his own language makes this statement:

> "It would be a great reproach to the law if in its jealous watchfulness over the freedom of testamentary disposition it should deprive age and infirmity of the kindly ministrations of affection or of the power of rewarding those who bestow them."

Evidently the method of disposing of his property and the persons to whom at least a part of it should go by deed had been thought over before Mr. Watts made his last visit to his daughter, for in the early part of March, 1914, and on the occasion when the old gentleman and Homer Watts drove out to the Henshell sale, he was making inquiry of Homer how deeds might be writen to reserve a life estate to one, and was also talking about what property his divorced wife had, and in that conversation he said to Homer that he intended to give Vernita some of his

property, and he asked Homer if Homer would care if Marvel's wife should have some "for the care she has taken of me." (Testimony of Homer Watts, (Testimony of Homer Watts, page 267 of Evidence).

Thus it was in his mind on his return from California that the will was not altogether satisfactory, and one especial reason was that he wanted Vernita to have part of his property and he wanted Marvel's wife to have part for the care she had taken of him.

After his return from Jerusha's on the 11th of April, 1914 upon Homer's having made some remark about his father's condition, his father stated (page 188, Transcript of Evidence, page 150 Record, "The children have had enought differences in the family, I don't want to hear any more of it.

And after a bath had been given him and he had gone to bed on Saturday evening, Homer was sleeping in the same room to care for him, the matter of the disposition of his proverty was again discussed (page 189 of Transcript of Evidence, page 149-50, Record), and the old gentleman in substance said: "I have made up my mind what I am goig to do with my property. I am going to give a part of it to your mother, and I am going to provide for Vernita because she is a cripple, and Marvel's wife, and the balance of it I am going to leave to pay up my debts, and I hope you children will all get good friends, because you all have enough property. Now let property not divorce you children any longer."

That was on Saturday evening and he then said "I want your mother to come over tomorrow"; that would be Sunday. Mother was at Walla Walla and came over on Sunday.

The fact that his wife did come over on Sunday and that he had a conversation with her about making provision for her support, which was partly overheard by Homer Watts, and the fact that the old gentleman made the direct and positive statement to Mr. Taylor, after the divorced wife had been there, about their conversation and about the distribution of his property, shows conclusively and beyond doubt that the old gentleman never destroyed the will voluntarily while at Jerusha's in order that each of his three children might share the property equally. No such thought was ever in his mind, because, as was natural in his last days, his mind reverted to the long years of service rendered to him by his divorced wife and there was uppermost in his mind a thought that she should be properly provided for, and for this express purpose, after he returned home and after, as Jerusha Crab says, he had told her she should have one-third of the property, and immediately on his return home he sent for his divorced wife in order that he might provide for her needs and wants. This circumstance in itself refutes the statement of the contestants that the will was destroyed for the purpose of giving to Jerusha Crab a third of his property, and adds another reason why the will was not satisfactory. The will made no provision for his di-

vorced wife, and doubtless in his failing health his mind reverted to the possibility of her needs. This is evidenced by his anxietv to have her come to talk with him upon this subject immediately on his arrival home, and by his inquiries of both her and the boys as to her needs.

True, after talking with her and after inquiring as to her condition, he ascertained that there was nothing that she needed, and therefore she received nothing, but doubtless the slightest intimation upon her part that she might need or want any part of his property would have called forth from him an immediate favorable response.

We especially call the Court's attention to the talk had between Mr. Watts and his wife, Lizzie, on Sunday, as partly overheard by Homer Watts and as detailed by Mr. Watts to Mr. Taylor in a later conversation. Then, after he had had a talk with his wife Lizzie, and ascertained that she needed nothing, he again had a talk with Homer, either Sunday evening or Monday morning, and Thomas J. Watts stated to Homer (Page 190 of the Testimony, Page 149 Record), that he had then thoroughly decided what he was going to do with his property and he wanted Homer to fix the deeds; stated that he had intended to give the lower place (that is, the 320 acres that was deeded to Vernita) to his divorced wife so that she might have the income of it for her life time, and then the remainder over to the little girl Vernita, but

he went on to state that Lizzie had plenty and that he was going to deed the land to Vernita because "She is a cripple and she needs the property; she has been closer to me possibly than anyone else in by old age, being around me so much," and he said "The Carmichael 80 and the 40 adjoining that, you fix that so that Marvel's wife takes the transfer to the property, and I will take the income off of it, because that will be plenty to keep me"; then he said there was "the other 80 acres there, we will leave that out now to pay the debts with, and I will tell you what to do with it, so that you will know," and he said "Now Homer, Jerusha understands how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel and" he says, "Marvel will have no fuss at all because it goes into the family"; and he says, "I think you children can get along better than you have in the past"; and he said, "Now Homer, you are the only one that is going to cause a lawsuit in this matter, and I want you to attend to it and attend to it right"; and he says (Homer) "I will not cause a lawsuit in this matter if I don't get a pleasant look from this time out; if you don't want any trouble I will cause none."

Now, in accordance with this direct request and in accordance with what had been evidently a preconceived and well studied plan of how his property should finally be disposed of and given expressly and distinctly in detail to Homer Watts, the deeds were

prepared. What more natural than that Homer Watts should prepare the deeds? And what more natural and just disposition could any man under the circumstances have made of his property? The daughter, Jerusha, was well fixed; had inherited $10,000.00 approximately from an uncle's estate, was married and her husband owned property worth at least $50,000, a comfortable home and not in any manner in want. The boys were both grown and both well fixed financially,—not a question of want or need with them or either of them; all three of the children healthy, bright, intelligent persons, all wealthy, far more so than the old gentleman at that time, and no likelihood of any of them ever being in want or need. More likelihood of hard feelings existing between them if the property was given to any one, or even equally to all three of the children. The boys would have believed that Jerusha was not entitled to receive anything, because she had not helped make anything. Were it all left to Marvel Watts, Homer would naturally feel a resentment, and evidently this is so to some extent, even under the present disposition of the property, but holding sacred the promise made his father, he has done just what and is doing what any just and upright man would do to uphold what he knows to be his father's wishes, directions and requests respecting the disposition of his property. Provision was made for Vernita Watts, the cripple girl, **the girl whom the old gentleman said had been closer to him than anyone else in the later**

days of his old age. Provision was made for Jennie Anderson Watts, the one who would crawl upon her hands and knees upstairs and wait upon him, though herself in ill and failing health; a remembrance of gratitude rather than a gift to supply their needs, and yet, withall, he reserved to himself the income during his life time from the lands deeded to Vernita, ample for his support. He reserved the 80 acres and the income from that for his support and with which to pay his debts and obligations. Looking at it in the light of all of the circumstances surrounding this case, the disposition of his property shows a remarkable, clear and intelligent mind, and shows such a disposition as one might well approve of in every respect.

We now come to the execution of the deeds. It is always easy to suspicion fraud or to say after a thing is done, if it had been done in some other way it would have been better; yet the execution of these deeds was the most natural and reasonable under the circumstances. If Homer Watts and Marvel Watts had been attempting or had had in mind using fraud for the purpose of securing the execution of these deeds it would doubtless have been done in a very different manner. The eminent counsel for the plaintiff in argument in the District Court said much about the "Saloon Keeper," Jonas, and yet, not a syllable or breath was raised by any person respecting his honesty or integrity; it was not uncommon and not especially disgraceful in days past that one

who was operating a hotel might also keep a bar or keep intoxicants for sale at the hotel, and this is the most that can be said against Jonas. He had been an intimate friend of Thomas Watts during his life time. Thomas Watts had been a friend of his father's. He is an intelligent man and gave direct and positive testimony as to the manner of the execution of the deeds. He acted as a witness to the instruments and perhaps thought no more of the matter until they were called into litigation. The testimony of Homer Watts and of Jonas both show the clearness of the old gentleman's mind at the time the deeds were executed. A miscalling, apparently, of the Township and range when the deed was read over, either that or a misunderstanding upon the old gentleman's part of the words used, caused him to ask them to be reread and to dispute to some extent as to the numbers of his land, showing his mind to have been perfectly and absolutely clear at that time as to what property he owned and how he wanted it disposed of.

Counsel also had the execution of these deeds shrouded in secrecy and mystery. If Homer Watts and Marvel Watts and their wives and Vernita Watts were scheming to secure this property by reason of deeds fraudulently obtained, certainly Homer Watts and Marvel Watts are shrewd enough that they would have had all of the members of their family present and all of them would have been able to testify in the case, and even the nurse, Mrs. Carden,

would have been kept in or about the house if the deeds were executed in pursuance of a plan of fraud. LeGrow, the banker whom the counsel would have the Court believe fraudulently assisted in covering the recording of the deeds, would have been there. The testimony of Watts and Mrs. Carden and of Mrs. Homer Watts all clearly explain why Mrs. Carden and Mrs. Homer Watts were gone just at that time. The testimony of Watts and of Jonas explains how they came to be there and how the deeds came to be executed at the house on that day. If all of the members of the family had been there, and perhaps a half dozen outsiders, we would find the eminent counsel on the other side insisting with greater force that Homer Watts and Marvel Watts had gathered into the household all of their friends in order that they might act as witnesses and help unjustly to deprive the old gentleman of his property. In fact, we do find counsel asserting that the Watts' had gathered a bunch of business men on the street in order that they might meet the old gentleman and testify to his mental capacity on the day the deeds were executed. If these men had not been there we would expect counsel to say: How strange! No one saw the old gentleman.

The manner in which Jonas came to be at the hours on two different occasions is fully explained both by his testimony and the testimony of Homer Watts. Some time previous Jonas had given Watts a note of $300.00 for collection. On the morning in

question Jonas had gone to Watts' office to make inquiry about the note, and not finding him there had walked on up to the house, and while there was informed by Watts that he had received a letter respecting the note, and was asked to come back to the office that afternoon. In the afternoon Jonas went to the office to look after the same matter and to talk with Watts about the collection. From there they together walked up to the house and while there Thomas Watts himself asked Jonas to sign the deeds as a witness. Jonas is now farming in Montana, is a married man of family and the testimony shows him to be an upright, law-abiding citizen, and if he were not so the able counsel would certainly have found people about Athena, where Jonas lived so long, or about Echo, where he was engaged in the butcher business, to show this fact.

Counsel argued in the lower court, and we expect it here, that Mrs. Carden and Mrs. Homer Watts were sent away from the house in order that they might not be present at the time the deeds were executed; but counsel overlooks the fact that Mrs. Homer Watts testifies that she had been told by her husband a day or two before that the deeds were to be made, was told by him a day or so afterward that the deeds had been made, and testifies as to just how and why she came to take the car and take Mrs. Carden home. Mrs. Carden had requested Homer to come home early in order that she might go to her own home and get something or do something. Homer

had promised to do so and was detained at the office much longer than he expected and had arrived home late, perhaps, for Mrs. Carden to go out to her home and return, and Mrs. Homer Watts took the car and took her to her home and then, at her own suggestion, took Mrs. Carden for a ride.

Another matter argued by counsel is the fact that Homer Watts at one time was engaged either for Mable Warner or against her in what he terms the famous Warner-Young will case. There were numerous of these cases, some of them criminal, some of them civil, and some in the Probate Court and some in the Circuit Court, and there is scarcely an Attorney in Umatilla County who was not in some manner or other engaged in the trial of some one of these cases, and one of the eminent opposing counsel in this case was in most of them. It is not shown by the testimony whether or not Homer Watts was attempting to sustain the validity of any one of these wills, but if so, only as an Attorney and in a position similar to that occupied by many other Attorneys in the County. Further, there is nothing in the evidence to show that the LaRoque will was ever procured or induced by fraud. True, the will was set aside, as the court records will show, butso far as we are advised, not upon any grounds of fraud or attempted fraud upon the part of Homer Watts, and so far as any unde influence is concerned, we fail to find anywhere, either in the evidence in this case or outside of it, where any of the defendants in this

case have done or performed the slightest inconsistent or unworthy thing with a view of inducing or in any manner influencing Thomas J. Watts in the disposition of his property. Homer Watts is strictly carrying out a sacred promise made to his father, and neither is this promise an afterthought suggested or made for purposes of this suit.

A letter written by Homer Watts to his sister immediately after the death of his father, is found on pages 580 and 581 of the Transcript of Evidence, and in that letter, written on the 28th day of April, practically within a week after the death of the old gentleman, Homer Watts has this to say to his sister: "I promised Pap that I would retain by peace and cause no disturbance."

We come now to consider the capacity or competency of Thomas J. Watts to understand and comprehend the nature of his act in making these deeds. Bearing in mind the various expressions that he had made to his friends and relatives, which we have hereinbefore enumerated, with respect to his intended disposition of his property, we find the deeds to be substantially in accord with those expressions. One other instance we may cite which was probably overlooked heretofore in this brief, and that is the testimony of Marvel Watts, regarding a conversation which took place between Marvel and his father, along in the summer before he went to California, found on page 376 of the Transcript of Evidence, page 198 Transcript of Record:

"He and I went out to the ranch one day and he asked me what I thought about remembering my wife, and I said, well Daddy, it is just up to you, do as you like, and he also spoke about my mother, and asked me how much money she had and her condition, and regarding her ailments, and I told him, and he wanted to know if I thought she had money enough to take care of her, and I told him I thought she probably had."

So that in sending for his former wife and executing the deeds in favor of Vernita and Jennie Anderson Watts, the act is only following expressions that had been made by him long prior to the execution of the deeds.

It is admitted, of course, that the old gentleman was very weak in body and needed continual assistance. At times naturally he would be drowsy and sleepy and perhaps somewhat dull mentally, but that he was possessed of a clear and intelligent mind up until at least a couple of days after the making of the deeds can scarcely be questioned. The witnesses to this effect who saw him are all agreed, Homer Watts, Guy M. Jonas, David Taylor, S. F. Sharp, his physician, Marvel Watts, Samuel Hutt, Jennie Anedrson Watts, Jane Carden, Linden Vincent, Mrs. Homer Watts, all are persons who saw him after he returned from his last trip to the State of Washington, all who saw him upon the day the deeds were executed, and all testified that his mind was clear

and that he knew what he was doing. Marvel Watts testifies on page 375; Transcript of Evidence:

On the evening of Wednesday, next day after the deeds were drawn, I went over to Homer's house to stay with father or to ask him about staying with him." Note the language used by Mr. Watts at that time: "I don't want anybody; I don't need anybody; when the folks get ready to go to bed turn off the lights and go to bed." "And then he asked me if Homer had given me those deeds (Page 197, Transcript of Record) and I said he had, and he said he hoped everything was satisfactory, and I said, as far as I am concerned it is, and he said, Homer promised there would be no trouble over it, and I told him I didn't think there would be."

Note the conversation had between Homer Watts and T. J. Watts at the time the deeds were executed, how carefully the old gentleman requested the second reading of the deeds in order that he might be sure the numbers were right.

We also note the testimony of Dr. Sharp, the physician in attendance upon him, on pages 358 and 359, Transcript of Evidence, 192-193, of Record; it is in substance: I saw him on the 12th or 13th and every day thereafter up until the date of his death. I was there every day. I may possibly have missed one day, but I do not remember. **His mental condition was good up until Thursday, anyway, and possibly Friday.**

And David Taylor, T. J. Watt's most intimate friend and of almost half a century's acquaintance, a man who we may add is so well known to be of high character that any attempt to add to it by words of ours must necessarily fail, testifies at page 314 of the Transcript of Evidence, 184 Transcript of Record, "Well, I never could see any difference, only his mind, I suppose, would grow a little weaker as his body did, but he seemed to have just as good a mind as he ever did, to my notion. It took him a little longer to get at it, to express it, but he spoke just as rationally as he ever did.

A. Yes, that day and the other conversations too, all of them.

Linden Vincent, a young man of strict integrity, a son of Dr. F. W. Vincent of Pendleton, testified to seeing the old gentleman on the day the deeds were drawn, in an automobile in front of his place of business, and having a talk with him. His testimony appears at page 560 of the Evidence, 238 Record. The old gentleman on that date said to him, "I got outside and I felt brighter," and when Byron Hawks, the druggist, came out he gave him an order for some packages, apparently some medicines of some character, and this was brought out to the automobile and given to Mr. Watts by Mr. Vincent; and on page 562 he testified further:

Q. Did you hear him talk any about automobile riding?

A. No, just as I said, he said that he had got out and he was feeling fresher since he was riding. That is all I remember hearing him say.

Q. Now what appeared to you to be the condition of his mind on that day while you were talking to him?

A. O, very bright for a man in his condition. I would consider it very bright.

Q. His conversation with you was an intelligent one was it?

A. O, just about the same as usual.

Q. Did you observe any difference in his mental condition on that occasion and what you had observed it to be on former occasions when he was there in the drug store talking to you?

A. No, I don't think I did, because I would have remembered it if I had. He seemed just about the same as ever to me, because I stood so quite a little bit.

Mrs. Carden, the nurse, at page 535, testifies:

Q. Now do you remember a day that he was out automobile riding with Homer Watts?

A. I do.

Q. What was the condition of his mind up to that time and perhaps for a day or two subsequent to that time?

A. Well, he was rational up to that time.

Q. Would he know people when they came in?

A. Yes, sir, he did.

Q. Answer questions and ask questions in an intelligent manner?

A. He did.

Q. Seemed to understand all that was going on around him up to that time?

A. Yes.

Many others testified in substance the same, most of them entirely disinterested witnesses, and in view of the overwhelming testimony to this effect, we believe there is no question, under the decision of Sawyer vs. White in 122 Fed. Rep. at page 224, but what the old gentleman at the time the deeds were executed was perfectly competent to determine intelligently what he was doing and whether or not he wanted to do it. In that case Circuit Judge Sanborn lays down the rule to be as follows, supporting it by many authorities:

> "But the question of his mental capacity is not whether or not the powers of his mind were impaired or whether or not he had ordinary capacity to do business, but whether or not he had any—the smallest—capacity to understand what he was doing and to determine intelligently whether or not he would do it."

And the Court says:

> "Any other test would wrest from the feeble and the aged that power over their earnings and savings which is their best safeguard against misfortune and would produce endless difficulty and litigation."

And in that case, one where the donor was eighty-eight years old and had executed a deed of his property valued at $20,000.00, a case where the Court said the donor was practically helpless and required constant assistance and attendance to enable him to arise from his bed and to procure and take his necessary food and drink, while at other times he was able to walk a block or two with the aid of a cane. He was a feeble old man and his mind was undoubtedly much less active and powerful than when he was young and vigorous, and in conclusion the Court said:

> "The deed cannot be void for lack of mental capacity in the grantor to make it."

We are now led up after the execution of the deeds, to their delivery. The old gentleman had requested Homer Watts on Sunday night and Monday morning to draw and prepare the deeds. This, however, had been communicated to Homer Watts' wife prior to the making of the deeds. On Tuesday, the 14th of April, the deeds were executed. After having been signed the old gentleman retained them for

a time in his possession, and handed them to Homer Watts with a request that he either give them to Marvel or see that they were recorded. The next morning, Wdnesday morning, Homer Watts handed them to Marvel Watts and Marvel requested Homer, inasmuch as Homer stated he was going to Pendleton, to bring them here and have them recorded. On Wednesday evening the old gentleman asked Marvel if Homer had given him the deeds; Marvel replied that he had and that there would be no trouble about it. Homer Watts came to Pendleton, was busy in the trial of a case in court on Thursday and Friday, and either through lack of time or forgetfulness failed to have either of the deeds recorded. Having failed to do so, he informed Marvel Watts of the fact on Saturday morning, and on Saturday morning Marvel Watts took the deeds to the bank and requested the bank in its usual course of business to send them down for record, and this was done.

Counsel make a contention wholly unsupported by the evidence, to the effect that the deeds must have been sent down Monday morning by special messenger, after the old gentleman's death. He died at eight o'clock on Monday morning, and the deeds were filed for record about 11, and it is this undue haste in recording the deeds that counsel would make appear as a badge of fraud. To our minds this creates an inference that the deeds had been delivered to the bank for record prior to the old gentleman's death. After his death there could be no need

for haste in recording. The grantor could not then recall them and either Homer or Marvel would know that any such undue haste was not only unnecessary, but would be a badge of suspicion if the deeds were fraudulent.

If the matter stood alone and without any explanation, it is true that there would seem to have been unseemly haste in placing the deeds of record, but in light of the explanation given by all of the parties connected with the delivery and record of the deeds, the contention is wholly unwarranted and untenable.

By a course of argument not based upon any foundation of fact, counsel undertake to show that because the deeds were not received at the court house until 11 o'clock, that they could not have been delivered by Watts to LeGrow, the banker, and must have been brought to the Recorder by messenger. This is wholly unfounded and unreasonable. The Recorder testifies to his usual course of business in such things, not only with this bank, but all others, in sending deeds for record with a blank check signed, to be filled out by the Recorder without letter or note of explanation, and that upon receipt of such deeds he made a notation thereon to whom they were to be returned. It may be possible that LeGrow did not mail the deeds until Sunday morning, or it may be possible that they were placed in the postoffice and the mail not sent out on Sunday, or possibly they arrived at the Pendleton postoffice and were not distributed on Sunday and that the Sun-

day's mail was not distributed even on Monday morning until after Mr. Burroughs had gotten his mail, as he testifies he often did at the hour of six o'clock and before the postoffice was open or the 8 o'clock Monday morning mail delivered. Any one of these theories is more reasonable than that Marvel Watts and LeGrow and Burroughs would testify falsely in the matter.

In this case there was no reason for haste in recording the deeds after the old gentleman's death. If they had been executed and delivered to Marvel Watts they were perfectly safe and effective without record, and there was no need of haste either before or after Mr. Watt's death.

Homer Watts and Marvel Watts are not largely interested in property and an impression is left, perhaps not intentionally, to the effect that they own some seven or eight hundred acres jointly in Montana. True, they now own lands together, as we understand it, which have been purchased since the old gentleman's death, but at the time of his death and the time of the execution of these deeds, they had nothing in common except that they were farming the lands of Mr. Watts under lease and had been so doing for several years in the past. They continued to farm these lands under the same terms and to turn the rents due to Vernita Watts and to Jennie Anderson Watts. There has been no change in the situation except a change of ownership of the lands

from J. T. Watts to Vernita Watts and Jennie Anderson Watts.

In this connection, too, we call the Court's attention to the testimony of Jennie Anderson Watts on page 522, Transcript of Evidence, 219 Transcript of Record, respecting a conversation she had with "Grandpa Watts" regarding his property, and it is to be noted that each and all of the defendants in this case testify positively that there was no influence exerted by them or any of them to induce the old gentleman to dispose of his property in any manner; that there was no understanding, either implied or otherwise, that the title to the property should ever in any manner be changed so that other of the defendants might receive the benefit therefrom, and there is not a particle of evidence to the contrary, other than that the defendants may have had an **opportunity** to try to influence him. It would be very unusual if such an opportunity were not afforded to members of the family, but mere opportunity to commit a crime is no proof that it has been committed. If the burden of proof does rest upon the defendants to show that the deeds were executed without undue influence upon the part of them or any of them, then we believe this burden has been fully and overwhelmingly met by the evidence, both circumstantial and oral, in the case.

Having now presented to the Court our side of the case, though rather lengthy, we trust the Court will have patience with us while we briefly discuss

some of the features of the case presented by the plaintiffs and their witnesses with respect to what has taken place in the State of Washington. The witnesses there are mostly interested, John Crab and Jerusha Crab, who are the plaintiffs, and Mrs. Wheeler, their daughter. Two witnesses may be said to be disinterested, William Parker, an old acquaintance of Mr. Watts, and the man Skelton. If we had pages of space but little of it would be devoted to the testimony of the man Skelton. The production of such witnesses is in itself an insult to the Court. The mere reading of his testimony supplies the proof of its falsity. A perusal of the testimony of Skelton has the old gentleman speaking of his wife, Lizzie, as a "she devil" and has him going to visit Jerusha when it was "Disagreeable for him at other places," and way back, when Skelton was giving the old man Watts electrical treatment for a consideration, the old man "Many, many times, and almost continually" was shouting to him that he wanted his children to share and share alike in his property. Yet during this time the old gentleman had the will made in the bank by which the children were not to share alike in the property. And this witness compromised his wife's intimacy, according to his testimony, with "Old Watts," took Watts' money, gave it to his wife and afterward lived with her as his wife. We have neither time nor patience with such testimony.

W. D. Parker is a close friend and neighbor of the Crabs, a very old man, yet a man who bears the

impress of honesty. The only part of his testimony that is materially in controversy is his statement wherein he says that the old gentleman said to him while he was there on his last visit, that Jerusha was his child the same as the boys were and he wanted her to have her share of the property; but even in this Mr. Parker is not very positive as to the language, there appears to be many other things that he could not remember connected with the conversation, and the language "her share of the property" has been used so much by Skelton and the Crabs that it has grown familiar to him and we doubt very much whether or not he heard the language from Mr. Watts himself, or whether he has it confounded and mixed with conversations that he has had with some of the interested parties. However, it proves nothing with respect to the later execution of the deeds.

Permit us to briefly refer to the testimony of the plaintiff, Jerusha Crab, and her daughter, Viola Ada Wheeler. The similarity of the language used by each is most remarkable in many important instances, and especially is this true when they both testify in substance that they have never talked the matter over between themselves and that the subject of their testimony has never been discussed between them. This, of course, is unreasonable, and not to be believed under the circumstances.

Taking up first for consideration the testimony of Jerusha Crab with reference to the time that

Marvel took his father up to visit her, after his return from California,—and right here we may say, that if Homer Watts and Marvel Watts were conspiring to get the old gentleman's property they would certainly have made some provision for doing so before he ever went to see his daughter the last time. It is in evidence that they did not know the contents of the will; it is in evidence that the will was first opened by Mr. Watts himself, after he was up to his daughters', and we think it safe to say that if Homer and Marvel were conspiring in any manner to get his property, something more definite would have been done before the old gentleman was permitted to go to his daughter's at all.

However that may be, Mrs. Crab testifies that her father came to her place with Marvel on the 17th day of March, 1914, and he gradually grew weaker all the time until he took that bad spell. That bad spell was the 3rd day of April, 1914. Marvel came back on the evening of the 3rd day of April, 1914, about four or five o'clock. When Marvel got there his father was entirely unconscious. I suppose from the effect of the medicine and partly from the disease (Page 94, Transcript of Evidence). Marvel came up on the Friday evening and staid until the next Monday. I don't thing he (T. J. Watts)) recognized any of them (Page 95).

Q. Well now, at any time between the time that Marvel took him away on the 11th of April was he able t oget out of bed?

A. Not without help. Not without helping him out.

Q. Now, knowing your father as you did, having been around him as you have, and being there with him, what do you say in your judgment as to whether or not between the 3rd day of April, when he took this bad spell, and the time he went away from your place he was ever in a condition so that he could do intelligent business?

A. Oh, no, no.

Now we call attention particularly to this statement of the witness, because later on the plaintiff placed great stress upon the fact that T. J. Watts made them many assurances about the manner of the disposition of his property. If he were not capable at any time of doing any intelligent business, as this witness has testified, they certainly ought not rely upon such business as they claim he transacted or directed while he was in this condition.

Further testifying the witness says that the next morning, which would be the morning of March 18th, her father told her about the will, He said he had made a will and wanted her to send and get it. He said the will "did not suit him," that was all. The letter came later. (It is our impression the documents in evidence show that the will arrived there either the 26th or 27th of March). (Page 98, Transcript of Evidence). He did not burn the will right

there and then. He handed it to me and told me to put it away. I can't say how long it was put away. I put it away in the drawer. One morning he called me and asked if I would get the will. I brought it and handed it to him and he tore it open and read it.

The witness, on page 112, Transcript of Testimony, on cross examination, testifies that the will was put away several days. "I don't remember how long."

In this connection, it would seem a little strange that the old gentleman, who mentioned his will the first morning after he got there, making immediate request to have it sent for, received it a few days later and, without opening the envelope containing it or reading it, have it placed away and allowed it to remain several days. This, we say, is peculiar in view of the fact that the witness testifies that he was crying about the will and always talking about his property. It does not appear reasonable.

Another instance that is inharmonious is where Mrs. Wheeler, the daughter, testifies that she was present when he opened the will, and that neither she nor her mother read the will. Evidently this is one feature of the testimony that they had not discussed, for Mrs. Crab testifies, "I stood right behind his chair and seen every word that was in it. She did not know it, but I stood there a few steps away from him. It was wrote in very large print, hand write, and I could read it all."

Q. And you did read it all?

A. Yes, but I said nothing to her about it. It gave Homer and Marvel equal shares and made them both Administrators. He asked me to burn it and I told him I would not do it, and he said then, as he had said before, he would have to wait for Bill to do it.

Now what is the reason for any such conversation as that? The old gentleman was sitting right by the stove. All that was necessary was to put it in the stove, and according to the testimony, that was what was substantially done. Why all this talk about waiting for Bill in order that he might burn the will? And note the following answer given by Mrs. Crab on page 99, Transcript of Testimony:

Q. Did he say anything?

A. Yes, he said "Now it is done' with a laugh; "You shall have your share equal."

Note the anxiety of the witness also to have the old gentleman perfectly competent up until the time he had the bad spell, and after that to have him so incompetent that he would not be able to execute deeds. The plaintiffs seem to overlook the fact that they are relying upon his being perfectly competent to tell them what he wanted done with his property, and to tell Marvel what he must do.

The witness (page 100) says: Yes, after he came there the last time, and before the will was destroyed

(he was talking a great deal about his property); and going on the witness answered: "After the will was destroyed, before he got so sick that he could not intelligently talk." He said every time that he wanted us three children to divide it equally, wanted myself, Marvel and Homer to have equal shares. The property seemed to be on his mind continuously. If he ever mentioned the will he cried until I had to pacify him to keep him from crying so hard. He said he didn't want to make the will in the first place. He said they made him do it, or rather forced him to do it."

Now, either the old gentleman was incompetent to know what he was talking about at the time he made these statements or, as a matter of fact, he never made them at all. The testimony all shows conclusively that the last will was made in October, 1910. That he knew just where it was and all about it. That it was made before B. B. Richards, when none of his relatives were present. And it is absurd to say that the old gentleman at that time told Mrs. Crab that he never wanted to make that will and that the boys forced him to do it. It is also unreasonable and absurd to think the old gentleman would keep the will in the house unopened for several days, as testified to by Mrs. Crab, and be crying continuously about its contents, both before and after it was opened and destroyed, according to her testimony.

Another point of difference between Jerusha Crab and her daughter is, while the language is iden-

tical, they have different dates upon which Marvel and his father had the first conversation after Marvel's arrival there on the 3rd of April. Take the testimony of Jerusha Crab (Page 101):

Q. Did you hear any talk between him and Marvel about that?

A. Yes, I heard what he said **in the evening.**

Q. What did he say?

A. He says, Marvel, if you have come after me to take me down to make any papers, I won't go ary step.

And on page 102:

Q. Now what did Marvel say when he told him that?

A. Why, he says, Father, we have no such intention as that. He says, it shall be divided equal, he says, I won't influence you to sign anything, or words to that effect.

It will be remembered that this conversation, according to her testimony, **took place on the evening** that Marvel arrived there to bring the old gentleman home, and at a time, too, the Court will remember, when the witness Crab has testified on two different occasions that the old gentleman was not competent to do any intelligent business.

Mrs. Wheeler testifies on pages 70 and 71 that this conversation took place between Marvel and his

father on the **next morning** after Marvel came there, and we note the significant and suspicious line of testimony where both Mrs. Crab and her daughter were always conveniently just outside, where they could hear everything, and how they listened to the different conversations about the property, can remember no other part of the conversation, cannot even give another word except practically in the identical language to reiterate what was said respecting the property, and yet they have never never talked it over between themselves. I suppose, though, if they could hear at all, one would hear the same words if listening in the kitchen that the other would hear if listening in the parlor,—yet these people "Had no particular interest in the property," had never in any manner said anything to the old gentleman about how it should be disposed of.

On page 111 Mrs. Crab testifies:

Q. You didn't pay any attention to what he was saying about his property?

A. Not very much, just paid attention enough to show respect and listen to him, I could hear him all over the house—be kind to him.

The witness, however, according to her own testimony (though in substance contradicted by her daughter) was interested enough to stand back of him and read the will, every word in it, written, as she says, in large print, and to endeavor to establish the fact that Homer Watts had made the will and

that she saw his name signed to it, doubtless for the purpose of making it appear that Homer Watts was the instigator of that will.

On page 109 Mrs. Crab, testifying with regard to what transpired on the morning of the 18th, the next morning after Mr. Watts' arrival there, testifies, in substance, that she did not think Marvel had got to town yet when Mr. Watts commenced to talk about his will.

Q. Now, was that the first thing that was said between you at the time about his property?

A. Yes, I didn't know he had a will. He said, Jerusha, I've got a will and I want you to send and get it, write and get it for me.

There is a positive declaration of the witness that that was her first knowledge that the old gentleman had a will, which dóes not compare favorably with her statement, made on page 126 of cross examination, in which she says "Marvel told me that there was a will, the first I ever heard of it. If you want me to tell that story, why, I can.

And the witness proceeds to detail how upon the arrival of Marvel there the first evening he "winked" or "nodded" or did something to attract her attention, called her out behind the house and requested her to get the will and destroy it, to keep Homer from getting any of the property.

Marvel further said, "Well, Homer has never treated father right and I don't want him to have any of the pproperty. You should have your share. I feel that you should have your share. I would like you to get it and have him make another will. I said to him, It is not right, Homer is our brother and father's son, and I believe Homer is a good boy, and I want to see him have just as much as I have or as you have. He is as much entitled to it as you or I." (Page 139, Transcript of Record).

Just for a moment consider the unreasonableness of the plaintiff's situation. If Marvel Watts knew of this will and knew it was in the bank right in his home town, where he was a director or officer, perhaps, of the bank, why should he request his sister, way up there, to write down and try and get hold of this will and destroy it, and what interest would Marvel have, if he knew the contents of the will, in having her get it and destroy it, and give her the share of property that Homer might get, or possibly leave him out altogether? The reasoning is absurd. And compare this modest request with the testimony of Jerusha Crab given on page 103 and 104, Transcript of Testimony (133 of Record), referring to the time they were out to the train as Marvel was bringing his father home:

Q. Now, did you have any talk with your brother Marvel there at the train?

A. Yes, sir.

Q. In relation to the property in any way?

A. Yes, sir.

Q. How did that occur and just what was said?

A. He came up to me and he says "Now Jerusha, don't worry any thing about the property, there has been family trouble enough and we will divide it equally and have peace now.

What family trouble had there been? Why should Marvel be making any such remark as this? There had apparently been no controversy, no family trouble over the property. According to Jerusha's testimony she had not been worrying anything about the property, apparently, and there is nothing watever to call forth any such remark. The serious condition of the old gentleman was not brought to mind. Jerusha would have the old gentleman the morning that he left, at a time when she herself testified he was incompetent to do anything, calling the family in one at a time and repeating, "On my word of honor I want Jerusha to have her one-third of the property, and I want it divided equal." There had been no controversy, nothing to call forth any such remarks. The witness had Marvel Watts calling her off around the house to get her to destroy a will in which he is one of the chief beneficiaries, insisting that Homer be cut out of the will, and then she has Marvel Watts calling her off down beside the train to tell her that he will see that the property is divided equally.

If this case were reversed and suit were brought against Jerusha Crab and her daughter for influencing the old gentleman in the destruction of his will, and the case were being considered from that point, it seems to me there would be no escape from a conclusion of guilt. A casual reading of the testimony of Jerusha Crab and her daughter sounds fairly well, but in a close inspection it is most convincing that they are not telling the truth in many important respects, prompted possibly by chagrin and disappointment growing out of the, to them, unsatisfactory results of the former case outlined at page 263 et seq. Transcript of Record.

Inasmuch as the opinion of the Hon. District Judge appears to have been grounded upon the cases of Allore vs. Jewell, 94 U. S., 506, 24 L. E., 260, and Jenkins vs. Jenkins, 66 Or., 12-17 (Transcript of Record, page 90), we desire briefly to discuss the application of these cases to the case on trial. We have heretofore shown that the rule as to Burden of Proof laid down by the Supreme Court of the State of Oregon in Jenkins vs. Jenkins supra, does not prevail in the Federal Courts, by the latest expression of the Courts upon the subject.

Towson vs. Moore, 173 U. S., Page 17-22, 43 L. E., 593.

Considering then the case of Allore vs. Jewell, supra, it is noticeable that the grantor for a long series of years had been and was bordering on insanity; her physician testified that for many years he had considered her partially insane and that in his opinion she was not competent to understand a document like the one executed. This condition was corroborated by a large number of witnesses. The grantee had been informed by her physician that she was "Not in a condition to make any sale of her property in a right way." No single witness could or did say that she was insane, or wholly incompetent to transact any business, but all agreed that her mind was so weak as to render any important business transaction with her of doubtful propriety. Notwithstanding this condition, which was well known to the purchaser, he, the purchaser, went with his agent and his attorney to her alone in her hovel and obtained the deed for a **consideration,** but for a wholly **inadequate** consideration.

In the cause on trial here all of the witnesses, his family physician, his intimate friend David Taylor, his nurse Mrs. Carden, and numerous other persons who saw the old gentleman at the drug store, all disinterested persons, testify to the clearness of his mind on the day the deeds were executed. Even if the statements attributed to him by the testimony of the Crabs, made on the morning he left Jerusha's house, be true, they show a clear condition of the mind at that time. **Here the grantees were his oft-**

time expressed favorites, worthy of his gratitude. And again, evidence is entirely lacking that Homer Watts is in the slightest degree a beneficiary under the deeds or that he was in any way acting for the grantees. He was an Attorney in good standing, one whom his father had confidence in as an attorney, and acted wholly as the adviser and Attorney and under the direction of his father at the time the deeds were made, and without any knowledge on the part of any of the beneficiaries that he was so doing. A case wholly different in all its material facts from the case of Allore vs. Jewell, except in the one particular, that both grantors were weak in body and died shortly after the deeds were made.

Owing to the advanced age and feeble physical condition of Mr. Watts at the time he executed these last deeds, we concede that the case is one that requires a full explanation of his acts in executing the deeds, and one that requires a showing as to his mental condition, but we believe that the requirements of the case have been fully met by testimony of witnesses and by the previous acts and declarations of the old gentleman, made at times when there could be no question of his sound mentality, and thus believing, we submit the case to the Court in full confidence that the deeds will be sustained and that the Court in so doing will have fully carried out the final

wishes and determinations of Mr. Watts with respect to the disposition of his property.

Very respectfully submitted,

WILL M. PETERSON,
AND
JAMES H. RALEY,
Attorneys for Defendants and Appellants.